

Bridget McCormack David A. Moran 1029 Legal Research Bldg. 625 South State Street Ann Arbor, Michigan 48109-1215 734.763.9353

Fax: 734.764.8242

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Mr. Corbin R. Davis, Clerk Michigan Supreme Court P.O. Box 30052 Lansing, MI 48909

Re: ADM File No. 2009-19

Dear Mr. Davis:

Thank you for the opportunity to comment on the portion of ADM File No. 2009-19 that would add a new MCR 6.502(H) and thereby impose a one-year statute of limitations for criminal defendants filing motions for relief from judgment ("6500 motions"). I am the Associate Dean for Clinical Affairs and the Co-Director of the Michigan Innocence Clinic at the University of Michigan Law School. I have been supervising students in a clinical setting for 15 years, and for all of these years my students have been doing some post-conviction work. This rule change would have an enormous impact on the Innocence Clinic, as well as other clinical programs at the law school where post-conviction work is done.

In the Innocence Clinic our law students investigate claims of actual innocence by Michigan inmates. We do not accept cases which are on direct appeal, so all of the work involves filing 6500 motions based on new evidence of innocence which has never been presented to a court. We have received approximately 4000 requests for assistance and we are working our way through the completed applications. We reject the vast majority of the requests, but we simply cannot get through all of the requests to meet this new rule's requirement. Because the new one-year period would begin to run from the date "on which the facts support the claim or claims presented could have been discovered through the exercise of due diligence," and the rule contains no other exceptions that would allow an actually innocent defendant to file a 6500 motion more than one year after his or her conviction became final, it is safe to assume that no matter how diligently our students and volunteer attorneys work, we will not meet the new deadline and none of the deserving cases, however few, will be able to be reviewed in court.

Perhaps of even more concern is the fact that even if the Clinic could review applications as soon we receive them, the vast majority of actually innocent prisoners will still be barred from presenting the evidence of their actual innocence under this proposal. It will almost always be the

case, especially considering the state of indigent defense in many Michigan counties, that the applicant's prior attorneys, using "due diligence," could have and should have discovered the evidence of innocence years earlier. The new proposal would completely bar actually innocent defendants from presenting evidence of their innocence that wasn't presented before because prior counsel were ineffective and did not find the evidence.

To be clear, under this proposal, an innocent defendant, who would not have an attorney after his or her conviction was affirmed on appeal unless he could afford to hire one, would have to somehow discover the exculpatory evidence that his or her prior attorneys should have found and then present that new evidence in a 6500 motion within one year. He would have to discover the evidence of innocence somehow from prison. If the innocent defendant finally learns about the exculpatory evidence 12 months and one day after his conviction becomes final, he will be completely barred by this proposal from ever filing a 6500 motion because his prior attorneys could have found that evidence through "due diligence."

The first case we filed, on behalf of Deshawn and Marvin Reed is illustrative of the high cost of the proposed one year statute of limitations to the wrongfully convicted.

Marvin and Deshawn Reed were convicted of assault with intent to commit murder in 2001 for allegedly shooting Shannon Gholston, while Mr. Gholston was driving his car in Ecorse. Mr. Gholston is a quadriplegic as a result of the shooting. The only evidence against the Reeds at trial was Gholston, who knew both men and said he saw Deshawn Reed fire a gun from a car driven by Marvin Reed. Two other scene witnesses saw it differently – they saw a man on foot in a nearby alley fire at Gholston's car. One of the witnesses identified the shooter as Tyrone Allen. The trial court (it was a bench trial) could not think of a reason why Gholston would lie and convicted the Reeds. They were both sentenced to approximately 20 years in prison.

What was not known to the trial court, however, was that Tyrone Allen and Shannon Gholsten had had a recent falling out and Allen was making threats to kill Gholsten. Nor did the trial court know that on the day of the shooting Allen showed up at his girlfriend's house and told her that he had just shot Gholsten. His girlfriend, alarmed by this admission, went to her father with it and he called the police and a report was made but never turned over to the Reeds.

Allen was killed himself while committing a carjacking in Detroit approximately eight months after Shannon Gholston was shot in Ecorse. He had two guns on his person when he was killed. The Michigan State Police tested those guns and one of them was confirmed to be the gun used to shoot Shannon Gholston. This fact also was not known by the trial court when it convicted the Reeds.

A few years after the Reeds were convicted, Shannon Gholston started telling his friends that he did not actually see who shot him that day. He even gave a videotaped interview in which he admitted that he named the Reeds only after several people who visited him in the hospital suggested to him that the Reeds were the most likely suspects.

The Michigan Innocence Clinic was able to interview Detroit Police Officer Robert Thomas, a friend of the Gholston family who was one of the first people to interview Shannon Gholston in the hospital shortly after he was shot. Officer Thomas revealed that Gholston told him, as well as the Ecorse police doing the initial investigation, that he did not see who shot him. Gholston, it turns out, has also told two witnesses at the scene of the shooting that he had not seen the shooter, and the Clinic was able to find those witnesses for the first time in 2009.

The Clinic presented all of this new evidence to Judge Patricia Fresard in a 6500 motion and at an evidentiary hearing held on the motion. On July 31, 2009, the Wayne County Prosecutor's Office agreed to dismiss the charges against the Reeds and Judge Patricia Fresard ordered the Reeds released, after eight years of wrongful incarceration. Much of the new evidence of innocence the Clinic discovered and presented was evidence that should have been presented by the Reeds' prior attorneys years earlier. The claims that Judge Fresard evaluated would have been barred if the new proposal had been in effect and Marvin and Deshawn Reed would still be in prison today, and they would remain in prison for decades to come, at a cost of millions of dollars to the taxpayers.

Trial courts are perfectly capable of identifying frivolous 6500 motions and treating them accordingly. In those rare cases where defendants can present evidence that they are actually innocent, they should not be barred from doing so by a time limit that would prevent an organization such as the Clinic from finding and presenting the evidence in court. And it would be tragic if this Court adopts a time limit that will insulate ineffective assistance of trial and appellate counsel claims from review even when that ineffective assistance consisted of failing to find and present evidence of actual innocence.

I therefore respectfully urge this Court not to adopt the portion of ADM File No. 2009-19 that would add a new subsection (H) to MCR 6.502. Thank you for the opportunity to comment.

Sincerely,

Bridget McCormack